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INTERNATIONAL VIOLENCE AND
THIRD STATES SINCE THE
WORLD WAR

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

INTERNATIONAL RELATIONS

1939

By
WILLARD N. HOGAN

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INTRODUCTION

The fundamental problem of the control of violence within any group lies in the relation of all other members of the group to the participants in a conflict. An essential characteristic of any community is an institutionalized interest of the collectivity in the methods by which any of its members attempt to settle disputes among themselves.

Within organized States, the permissible use of overt violence is subordinate to the preservation of public peace and order, and tends to be restricted to the immediate and urgent necessities of self-defense. The methods by which controversies may legitimately be settled are not evolved from the interaction of contending parties, but rise from the relationship of third parties to the disputants. The capacity for employing unilateral coercion is circumscribed by the actual or potential intervention of the entire State to obviate types of coercion which are reprobated. The legal process is essentially the dynamic expression of the collective attitude toward conflicts, and implements the assumption that any unwarranted act of violence is per se a wrong against the State itself. Likewise, the problem of the control of international violence is largely a question of the relation of third States to those engaged in hostilities. Any criteria of the legitimacy of the use of armed force by one State against another must be expressed in terms of the position incumbent upon all other States by reason of an application of such criteria. Obviously, the international system may require that third States remain "impartial" during the occurrence of conflicts, or the concern of all States in the methods by which any State attempts to settle its disputes may be recognized to a varying extent. The struggle between these two principles of international organization has a history contemporaneous with that of the State-system itself.

The breakdown of medieval feudalism and the rise of modern statism was characterized by the transition from a hierarchical to an equalitarian organization of European political units.

During the Middle Ages the theory of the relations between States at peace and those at war had been dominated by the conceptions of duty of the faithful toward the Church and loyalty of the vassal to his lord. The rise of the theory of States as sovereign political units, each supreme within its own sphere and bound by no allegiance beyond itself, made the former conceptions inapplicable. One implication of the new theory was the necessity of solving the problem of the position of third "sovereignities" with respect to those which might be involved in war.

A conception which offered itself as a point of departure for a solution to this problem was that of the "just war." This idea had been evolved as a rationalization of the incompatibility between Christianity and war. It found its classic expression in the writings of Aquinas, who laid down as the criteria of a "just war" that (a) there must be sufficient authority in him who declares it; (b) there must be a just cause of offense by a guilty party; and (c) there must be present a just intention to make war solely for the establishment of peace, the repressing of the wicked, or the assistance of the good.

Grotius was content to maintain that, in the event of war, third States should do nothing to hinder the just cause or to assist the unjust, and in case of doubt should remain aloof. From this point, two alternative principles were developed. One favored the development of some criteria of the legitimacy of participation in war. The other, stated by such jurists as Vattel and Bynkershoek, advocated the abstention of third parties from the conflict. Vattel was willing to admit that it was "lawful and praiseworthy" to assist the "just" belligerent, but insisted that immunity had been conferred upon the "unjust" belligerent by the voluntary law of nations, and that in actual warfare whatever is permitted to one must be permitted to the other. Therefore, there could be no discrimination in practice. Bynkershoek, however, took the position that it is not for a friend to judge between belligerents.

In the development of doctrines similar to these and from the demands of States insisting on a right of non-participation in war, the institution of neutrality was born. A condition of abstention from hostilities had been recognized even in the medieval period, and such codes as the Consolato del Mare had given a substantial degree of protection to the merchants of non-belligerent States. However, it was only in the eighteenth cen-

tury that there was developed, to a large extent through the Armed Neutralities and the influence of the United States, a generally accepted theoretical basis to support States desiring to remain neutral.

During the nineteenth century the relation of States at peace to those at war was dominated by what has come to be known as the "principle of traditional neutrality." When there was war between two or more States all other States had a choice between participating or assuming a status of neutrality. In general, the requirements of the law of neutrality were understood and accepted. The prevailing conception was that neutral States had certain rights as against the belligerents and certain duties toward them. Failure to fulfil the obligations of neutrality brought the risk of reprisals from any belligerent adversely affected. It is true that there were controversies over particular rules and recurrent violations, alleged and real, but nevertheless the principle of neutrality found an increasingly secure place in the system of international law, reaching its most comprehensive statement in the Hague Conventions of 1899 and 1907.

According to the nineteenth-century conception, resort to war was a fact outside the realm of law. International law recognized no right of passing judgment on the legitimacy of participation in war by States. A collective interest in the maintenance of peace might be expressed, as witness the Concert of Europe, but no penalty was attached to recourse to war as such. No matter what the circumstances of an outbreak of war, States which did not elect to participate were obliged to observe neutrality, the basic principle of which was impartiality as between belligerents. A State which started a war incurred no onus in law thereby.

The end of the World War found neutrality largely discredited as a basic principle of international law and organization. The events of 1914-1918 demonstrated that it was not effective in limiting the area of war, and changed conditions of warfare and the exigencies of opposing interests had completely undermined the accepted codes of neutral rights and duties. Moreover, the people of every nation were weary of war's senseless sacrifice of life and appalling destruction of economic wealth. For these reasons there was strong appeal in the movement to write sanctions against war into the system of international law and organization. There was a passionate insistence that "it

should not happen again"; and to the treaty to end the World War there was attached the machinery to prevent the occurrence of another war. International violence was to be restrained by attaching penalties to a resort to war. Differential treatment of belligerents would replace impartiality.

The attempt to achieve collective security on the basis of the principle of adverse differential treatment of an aggressor has been limited by certain positive survivals of the principle of traditional neutrality and by the absence of a complete acceptance and application of the newer conception. This dissertation attempts to describe the coexistence of the two principles in international law and organization since the World War. The method is to trace the extent to which the principle of differential treatment has been formally accepted, to indicate how the resultant obligations have been interpreted and applied, and to examine the function of the principle of traditional neutrality during the period.

There immediately arises the problem of the consideration to be given to a large number of related factors. Questions of national security, the definition of aggression, effects of domestic politics on foreign policies, national traditions, economic factors, and public opinion and propaganda are only a few of the subjects which are relevant to the problem of international violence and third States. Thus a comprehensive survey which included a consideration of all related factors would be an encyclopedic task. The alternative here adopted is to undertake the examination of the extent to which the principle of differential treatment has been incorporated into international law and organization, without inquiring into the related problems derived from an acceptance of that principle.

Also, it should be noted that the purpose of this dissertation is to describe a developing situation and therefore no attempt will be made to advance arguments for or against an acceptance of the principle of differential treatment.

CHAPTER I

THE COVENANT OF THE LEAGUE

[Abstract]

The fundamental idea of the Covenant of the League of Nations is the prevention of war by collective discrimination against any State which starts a war. By Article 11 of the Covenant any "war or threat of war" was made the concern of every Member of the League; a procedure for pacific settlement of international disputes was embodied in Articles 12, 13, and 15; and a non-violent method of making changes in the international status quo was provided for in Article 19.

The relation of third States to any State which should resort to war in violation of its obligations of pacific settlement was defined by Article 16, which provided that such a State shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

The necessity for an interpretation of Article 16 was immediately apparent, the principal questions to be answered being: (1) whose is the duty of deciding whether, in any given case, the sanctions of Article 16 have become applicable? (2) in the event that an affirmative decision on this point is reached by the competent organ, what are the precise obligations of the Members of the League?

Very early in the history of the League it was decided that the action of a State violating its obligations could not automatically give rise to the application of sanctions, and that it would be the duty of each Member of the League to decide for itself whether a breach of the Covenant had been committed. This interpretation was accepted by the International Blockade Committee, appointed by the Council pursuant to an Assembly resolution

of December 2, 1920; by the de Brouckère report, submitted pursuant to a Council resolution of September 4, 1926, in connection with the Preparatory Commission for the Disarmament Conference; by a report of the Secretary General of the League, dated May 17, 1927; and by a "Memorandum on Articles 10, 11, and 16 of the Covenant," submitted by M. Rutgers in 1928.¹

A second principle interpretative of Article 16 was that sanctions might be applied partially and gradually, instead of completely and immediately. There was a substantial agreement on this point, although the de Brouckère report criticized any tendency to weaken the force of Article 16. Finally, it was agreed that the "peculiar geographic and military position" of each Member should be taken into consideration in the application of sanctions. This principle was reflected not only in the juridical interpretation of Article 16, but also in the insistence by Switzerland on a recognition of its traditional neutrality, in the attitudes of the Scandinavian countries and of Canada, and in a collective note to Germany by the Locarno Powers (in 1926) to the effect that each Member of the League is bound to support the Covenant "to an extent which is compatible with its military situation and takes its geographical position into account."²

The three principles of interpretation outlined above were accepted by the Assembly and the Council as rules for guidance.³

These principles were also followed when problems relating to the practical fulfilment of the obligations of Article 16 arose. In the application of sanctions against Italy, which to date is the only State to be formally adjudged guilty of resorting to war within the meaning of Article 16; in the discriminatory arms embargo against Paraguay during the Chaco dispute; and in the application of the doctrine of non-recognition with respect to Japanese conquests in the Far East, it was clearly recognized that each Member State decides as to the existence of a "resort to war," that sanctions may be applied partially and gradually, and that

¹For the first three of these reports see League of Nations, Assembly, Reports and Resolutions on the Subject of Article 16 of the Covenant, Doc. A. 14. 1927. V. For the Rutgers Memorandum see League of Nations, Official Journal, 1928, pp. 670-86.

²League of Nations, Treaty Series, LIV, 299, 300.

³League of Nations, Assembly, Reports and Resolutions . . ., Doc. A. 14. 1927. V., pp. 42, 44.

the "peculiar position" of each State will be taken into consideration.⁴

⁴The more important documents dealing with the Italo-Ethiopian dispute are collected in Royal Institute of International Affairs, Documents on International Affairs, Vol. II, ed. Stephen Heald (London: Oxford University Press, Humphrey Milford, 1937). Cf. also League of Nations, Official Journal, Special Supplements No. 138, 145, 148, and 149; and Quincy Wright (ed.), Neutrality and Collective Security (Chicago: University of Chicago Press, 1936), pp. 185-259. For action in the Chaco dispute see Helen Paull Kirkpatrick, "The League and the Chaco Dispute," Foreign Policy Reports, Vol. XII, No. 9 (July 15, 1936). For the Sino-Japanese affair see W. W. Willoughby, The Sino-Japanese Dispute and the League of Nations (Baltimore: Johns Hopkins Press, 1935); U. S. Department of State, Press Releases, Nos. 425 and 426 (1937), pp. 380-82, 399-401.

CHAPTER II

DISARMAMENT, SECURITY, AND PACIFIC SETTLEMENT

[Abstract]

The problem of disarmament is fundamental in the establishment of any system of collective security. As long as war is expected or planned there can be no real progress in limitation of the weapons of war, while under the expectation of peace there would be competition in the reduction of nationalistic armaments.

By Article 8 of the Covenant, the Members of the League recognized that "the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations."

The first Assembly of the League, in 1920, invited the Council to instruct a Temporary Mixed Commission to prepare reports and proposals for the reduction of armaments as provided by Article 8, and the Second Assembly adopted a resolution calling on the Commission to present proposals in the form of a definite plan.¹ It appeared that the Governments concerned were willing to reduce their armaments only in exchange for a guarantee of security, and accordingly the Temporary Mixed Commission's report to the Third Assembly proposed that the security upon which disarmament depended be achieved by a general defensive agreement, which would be conditional upon an actual reduction of armaments.² Thus the principle of differential treatment was applied to the problem of disarmament.

On this basis, the Draft Treaty of Mutual Assistance was prepared and submitted to the Fourth Assembly in 1923.³ The Draft

¹League of Nations, Official Journal, Special Supplement No. [4a] (January, 1921), p. 31; ibid., No. 6 (October, 1921), p. 23.

²League of Nations, Report of the Temporary Mixed Commission on Armaments, September 7, 1922, Doc. A. 31. 1922. C. 631 1922. (C. T. A. 173.)

³League of Nations, Reduction of Armaments. Report of the Third Committee to the Fourth Assembly, Doc. A. 111. 1923. IV.

Treaty was submitted for the consideration of the Governments, which for the most part accepted it as a basis for discussion, with more or less serious objections to some of its particular provisions.⁴ These objections fell into three general groups--a rejection of the principle upon which the Draft Treaty was based, doubts as to the value of such a Treaty, and objections based upon the particular circumstances of particular States.⁵

Further consideration of the problem involved and the attempt to meet the objections to the Draft Treaty of Mutual Assistance led to a new plan embodying the additional feature of compulsory pacific settlement of international disputes. The work of the Fifth Assembly was based upon a co-ordination of the concepts "arbitration, security, and disarmament." As a result, there was drafted the Protocol for the Pacific Settlement of International Disputes (or "Geneva Protocol"), the fundamental principle of which was that national security was to be guaranteed and reduction of national armaments was to be attained by adverse differential treatment of any State which violated the provisions of an established procedure for the pacific settlement of international disputes.⁶

The rejection of the Geneva Protocol by the British Government⁷ in March, 1925, left no hope for its general acceptance. As an alternative, the British Government advocated the procedure of supplementing the Covenant by special arrangements to meet special needs. This suggestion was accepted by the other Governments, and the attention of the Powers was turned to providing a

⁴League of Nations, Arbitration, Security, and Reduction of Armaments. Extracts from the Debates of the Fifth Assembly including Those of the First and Third Committees. Reports and Resolutions Adopted by the Assembly and the Council, Doc. C. 708 1924. IX. (C. C. O. 1.).

⁵Ibid.

⁶Ibid. See also David Hunter Miller, The Geneva Protocol (New York: The Macmillan Co., 1925); P. J. Noel Baker, The Geneva Protocol for the Pacific Settlement of International Disputes (London: P. S. King & Son, 1925).

⁷Great Britain, Foreign Office, Statement by the Right Hon. Austen Chamberlain, M. P., on Behalf of His Majesty's Government, to the Council of the League of Nations, respecting the Protocol for the Pacific Settlement of International Disputes, Cmd. 2368 (London: H. M. Stationery Office, 1925).

guarantee against war in western Europe. As a result, the Treaties of Locarno were signed in December, 1925, and Germany became a Member of the League.⁸ Thus, the Locarno settlement marked a change of emphasis from the attempt to achieve security and disarmament by the application of a general system, such as that laid down in the Geneva Protocol, to the use of partial agreements which, it was hoped, would gradually become wider in scope and more general in application.

⁸ League of Nations, Arbitration and Security. Exposé of the Proposals, Declarations, and Suggestions Made at the Sixth Assembly and at the Council, with a View to the Pacific Settlement of International Disputes, Doc. C. 33. M. 75. 1926. V; League of Nations, Treaty Series, Vol. LIV.

CHAPTER III

THE PRINCIPLE OF TRADITIONAL NEUTRALITY

[Abstract]

Coincident with the incorporation of the principle of differential treatment into international law and organization there was also manifested some dependence upon the principle of traditional neutrality. It is obvious, of course, that refusal on the part of a State to become a Member of the League of Nations was a rejection of the principle upon which the League was based; and, if such a State did not in some other way accept the principle of differential treatment, either explicitly or implicitly, it would presumably remain attached to the principle of traditional neutrality, unless of course the League system were accepted by such a large portion of the international community as to become substantially universal.

One of the most interesting cases of positive survival of the principle of traditional neutrality is that of Switzerland, which became a Member of the League under the provisions of a Council resolution recognizing its unique position and status of perpetual neutrality. At this time, Swiss neutrality was conceived in terms of military abstention and economic solidarity.¹

In 1921, the Allied Governments issued a collective declaration of neutrality with respect to the Greco-Turkish War, when Greece was a Member of the League and Turkey was not.²

In 1922, the principle of neutrality was applied to the Far Eastern situation by Article 6 of the Nine-Power Treaty,

¹League of Nations, Assembly, Records of the Plenary Meetings, 1920, p. 398; Manley O. Hudson, "Membership in the League of Nations," *AJIL*, XVIII (1924), 439, 440; Switzerland, Bundesversammlung, Nationalrat, Message du Conseil Fédéral à l'Assemblée Fédérale concernant la Question de l'Accession de la Suisse à la Société des Nations (du 4 Août 1919) (Berne, 1919); Walter R. Zahler, "Switzerland and the League of Nations," *American Political Science Review*, XXX (1936), 753-57.

²Edouard Clunet (ed.), *Journal du Droit International*, XLVIII (1922), 433.

providing for Chinese neutrality in the event of war.³

During the decade following the adoption of the Covenant of the League several bilateral "neutrality treaties" were adopted. Some of the parties to these treaties were League Members and some were non-Members. The "neutrality treaties" were, typically, defensive agreements providing for "neutrality, conciliation, and judicial settlement."⁴ One of the most important developments with regard to this type of bilateral treaty was their use as an essential element in the security system of the Union of Socialist Soviet Republics. The maintenance of peace between the Soviet Union and limitrophe States was accompanied by a series of treaties providing for the recognition of the independence of the newly created boundary States, reciprocal guarantees against future attacks, acceptance of the principle of non-intervention, and the assumption of a policy of neutrality by signatories toward each other in the event of hostilities.⁵

A consideration of crucial importance with regard to reliance upon the principle of neutrality is the degree of dependence which may be placed in the law of neutrality. The assumption of a status of neutrality in the event of international hostilities would be relevant only to the extent that the particular relationships pertaining to that status are defined, recognized, and respected. During the World War the conflicting interpretations to which the law of neutrality was subject created great confusion in a branch of international law which had been considered well established. However, the Peace Treaties contained no provisions designed to settle the controversial questions regarding neutral rights and duties.

The settlement of the British-American claims, arising from the disputes of 1914-1917, was accomplished in 1927, but with the future juridical position of each Government expressly reserved.⁶ Since the World War, there has been no judicial decision with a direct bearing upon the general problem of neutral rights

³League of Nations, Treaty Series, XXXVIII, 283.

⁴Ibid., passim.

⁵Malbone W. Graham, Jr., "The Soviet Security Treaties," AJIL, XXIII (1929), 336; T. A. Taracouzio, The Soviet Union and International Law (New York: The Macmillan Co., 1935).

⁶U. S. Department of State, Treaty Series, No. 756, pp. 1, 4.

and duties. Only one multilateral instrument formulating the regulations of maritime neutrality was adopted after the World War; this was the Havana Convention of 1928, which was ratified only by the United States and some of the smaller Latin American States.⁷ An examination of multilateral treaties for the regulation of certain facilities and utilities of international concern reveals that they contain no provisions defining neutral and belligerent rights and duties.⁸

In addition to the above, it must be pointed out that the problem has not been clarified under the auspices of the League, and that there has been no official or unofficial codification or proposal which has found general acceptance. The customary rules have broken down and there is no new agreement to take their place. Neutral rights have in fact become neutral claims.

⁷ AJIL, Supplement, XXII (1928), 151-57; U. S. Department of State, Treaty Information Bulletin, Nos. 39 (Supplement), 40, 42, 84.

⁸ Hudson, International Legislation (Washington: Carnegie Endowment for International Peace, 1931-37), passim.

CHAPTER IV

THE PACT OF PARIS AND THE IMPLEMENTATION OF PEACE

[Abstract]

Signature of the Pact of Paris, on August 27, 1928, was an event of the greatest importance in the process of redefining the position of war in international law and organization. The idea of a solemn and universal renunciation of war, which had gained considerable support from public opinion, was developed during negotiations for a treaty of perpetual friendship between France and the United States, and was accepted by practically every State in the world.

The value and significance of the Pact of Paris¹ have been the subjects of great controversy, and have been discussed from every point of view. In the interpretation of the Pact, both practical and theoretical, the fundamental question has been that of the relevance of the Pact to the principle of adverse differential treatment of a State which resorts to war. In other words, in what position would a violator of the Pact stand with respect to third States?

No specific sanctions and no procedure for dealing with a violator were included in the Pact. Its brevity and generality were conceived by its authors to be among its chief advantages. The possibility of a breach was not even mentioned in the body of the Pact. It therefore appears that a recourse to war by a signatory imposes no legal obligation of differential treatment by third States, although subsequent development of the doctrine of non-recognition and other attempts to implement the Pact indicate that it was not conceived to be merely an idle gesture.

It seems correct to maintain that a violation of the Pact of Paris involves a reversion of the status quo ante with respect to the legal right of other signatories to go to war or use non-pacific means of settlement as against the violator. However, it

¹For text see U. S. Department of State, Treaty for the Renunciation of War (Washington: Government Printing Office, 1933).

should be emphasized that the loss of the "benefits of the Treaty" is not a mere cancellation of its provisions, such as would be involved in the normal lapsing of any treaty. A breach of the Pact constitutes an injury to all its signatories, and thereby lays the violator open to reprisals--which may legitimately be proportioned to the seriousness of the wrong suffered.

In short, the actual terms of the Pact of Paris do not require discrimination against an aggressor, but the implementation of the idea upon which the Pact is based does require such action. Its real significance lies in its function as a basis for making effective the techniques of peaceful settlement. One of the most delicate problems of a system of collective security had been that of a possible conflict between the League and the United States, especially with respect to a Latin American dispute. The principle of consultation, as enunciated by Secretary Stimson, afforded a means of obviating this difficulty, and at the same time raised anew the issue of the subsequent position of the principle of differential treatment in the international organization of the American republics.

The difficulties encountered in adjusting the Chaco and Leticia disputes emphasized the desirability of co-ordinating and implementing the general obligations of Inter-American peaceful settlement. Accordingly, the Pan-American conferences at Montevideo in 1933 and at Buenos Aires in 1936 devoted considerable attention to this problem, and attempted to achieve a co-ordination of a number of peace instruments, including the Pact of Paris and the Argentine Anti-War Treaty of 1933.²

It is not possible to make any definite statement as to the rights and obligations, with respect to international violence, resulting from this group of conventions. This is true for two reasons: (a) the task of co-ordinating the various instruments is not yet complete; and (b) the nature of certain of the textual provisions involved is such that their specific application cannot be stated with any degree of exactness.

The latter difficulty is particularly striking with respect to three qualifying expressions in Article 3 of the

²Seventh International Conference of American States, Final Act (Montevideo, 1933-34); Inter-American Conference for the Maintenance of Peace, Final Act (Buenos Aires, 1936).

Argentine Anti-War Pact.³ These expressions, which are either ambiguous or self-contradictory, are as follows: (a) the provision that the contracting States will adopt a common attitude "in their character as neutrals"; (b) the statement that the parties "will exercise the political, juridical, or economic means authorized by international law; they will bring the influence of public opinion to bear but will in no case resort to intervention either diplomatic or armed"; and (c) the qualification that any action by the parties will be "subject to the attitude that may be incumbent upon them by virtue of other collective treaties"

³U. S. Department of State, Treaty Series, No. 906.

CHAPTER V

DIFFERENTIAL TREATMENT AND NATIONAL POLICY: THE UNITED STATES

[Abstract]

The recent history of the United States affords an excellent opportunity for a case study of the development of national policy with respect to the principle of differential treatment. Its unique geographical and historical position as a world power, its sponsorship and subsequent repudiation of the League of Nations, its role in the adoption of the Pact of Paris, the development of the "Stimson doctrine," and its leadership in promoting American international organization for the maintenance of peace combine to make the United States an unusually important focus of interest with respect to one of the most crucial questions of international law and organization; namely, whether or not the historical trend is toward the acceptance of the principle of differential treatment as a basis of national action.

An analysis of United States policy and the problems of collective security during the period 1933-1938 leads to four conclusions.¹ First, the working out of a policy has been characterized by a conflict between the Executive and Congress, in which the latter has attempted to commit the United States to non-acceptance of the principle of differential treatment. For this purpose a legislated "mandatory neutrality" was devised. It is true that an important group in Congress has favored allowing discretion to the Executive, but this group has remained in the minority. In passing, it is interesting to note the elements of Executive discretion which are involved in the so-called mandatory neutrality legislation. The President still has the authority to decide when a "state of war" exists, and he apparently has sufficient latitude to decide whether the test will be the "engaging of armed forces in combat" or some more formal consideration as yet unspecified.

¹See Congressional Record, 1933-1938 (Washington: Government Printing Office, 1933-38), passim; U. S. Department of State, Press Releases, 1933-1938, passim; New York Times, 1933-1938, passim.

That the definition will be fitted to the occasion was in effect admitted by the Secretary of State in his letter of December 4, 1937 to Mr. McReynolds, Chairman of the House Committee on Foreign Affairs, in which American policy with respect to the Sino-Japanese conflict was explained. In this letter, Secretary Hull stated that "the Department of State keeps constantly in mind the fact that the principal purpose of the [Neutrality] Act is to keep the United States out of war."

Furthermore, since the details of a neutrality policy can not be devised in advance to meet all exigencies it is necessary to leave the application of at least some of the legislative provisions to the discretion of the Executive. For example, Congress cannot determine for all future international emergencies the practicality and wisdom of applying the "cash-and-carry" plan or an embargo on raw materials. On the other hand, merely to authorize the President to invoke such measures gives him the power to discriminate if he so desires. There seems to be very little possibility of forcing a President to pursue a neutral policy. "Mandatory" neutrality might be effective to the extent of putting some serious obstacles in the way of an unneutral policy, but it might also hamper the effectiveness of action best calculated to insure peace. At any rate, mandatory neutrality legislation is in itself no guarantee that a "neutral" policy will be followed.

Second, the American policy has been conceived in terms of war avoidance, rather than war prevention. The legislation enacted, the debates in Congress, the committee hearings, the statements of Administration officials, and public reactions indicate that the motivating purpose is to "keep out of war." That this should be the primary aim of all enlightened foreign policy is beyond dispute. Possible criticism arises, however, when it is considered that in the long run the best way to keep out of war may be to help prevent war. The interest of the United States in the prevention of war and its efforts to that end should not be minimized. At the same time, the contributions of the United States to the prevention of war have not involved an acceptance of the principle of differential treatment except to a very limited extent. For the most part the emphasis has been on avoiding war if it occurs, and the development of collective techniques for the abolition of war has been a decidedly secondary consideration.

Third, the traditional American insistence on neutral rights has been modified. This is implicit in the acceptance, in any form whatsoever, of the principle of differential treatment. Those developments of American policy which have expressed themselves in such ways as the Stimson doctrine are necessarily incompatible with any attempt at impartiality between aggressor and victim, and a fortiori with the assertion of the traditional "neutral rights." In addition, however, advocates of neutrality have demanded modifications of the same traditional policy. Because of the conviction that contact with war offers dangers of involvement in it, isolationists want all claims to neutral rights to be abandoned in the interest of war avoidance; others, believing that isolation is impossible or undesirable, want neutral rights modified to minimize the chances of involvement; while still others want a neutrality policy which will not interfere with collective action against aggression. Consequently, the traditional neutrality policy of the United States has been modified in two ways, by the adoption of such measures of discrimination against aggression as the doctrine of non-recognition and by important restrictions on the neutral rights claimed.

Finally, there has been a growing awareness of the problem involved in the effect of United States policy on collective action against aggression. The difficulties raised for any collective system by American non-participation are obvious. At first, the United States Government merely ignored the League of Nations. Later, the advent of the Pact of Paris and the enunciation of the Stimson doctrine seemed to point the way to some degree of co-operation with the League. The period of war avoidance by statutory neutrality brought with it a concern lest the policy of the United States operate as an interference with collective war prevention efforts. This problem had to be faced as an immediate practical issue during the Italo-Ethiopian war. The policy then adopted amounted to applying an embargo on munitions to both belligerents, using Government influence and "moral suasion" against supplying abnormal quantities of oil and other essentials, and hoping that the net result would at least not interfere with collective efforts to prevent further hostilities.

The situation in which the United States found itself, neither co-operating with the League nor maintaining an attitude of indifference, suggested a combination of de jure neutrality

with de facto discrimination. That is, this Government might apply to both sides those measures the incidence of which would be more burdensome for the aggressor than for the victim. For example, if the aggressor but not the victim needed American supplies a strict embargo could be imposed, and vice versa for the alternative situation. However, there is little to recommend a policy of refusing to co-operate in a collective system and at the same time trying not to interfere with it. The effectiveness of collective security depends upon joint, co-ordinated action. The best that a de facto "differential neutrality" could achieve would be a negative non-interference. It would be inconsistent with international solidarity and even with any norms at all for the regulation of international violence. No clear and definite policy could be followed, because the situation would change with each war, and each shift in the fortunes of any given war.

In brief, the problem confronting the United States suggests a generalization as to the fundamental dilemma of war avoidance; to wit, the international community is unable to control the use of violence among its members, and, once war has broken out, any policy which can be adopted carries with it grave risks of involvement in the conflict.

CHAPTER VI

"DE FACTO REVISION" OF THE COVENANT

The failure of sanctions in the Italo-Ethiopian conflict, and the abrogation by Germany of the Locarno system in March 1936, gave rise to what has been called a "de facto revision" of the Covenant. In particular, the small European States could no longer rely on the guarantees of collective security, yet the obligations of Article 16 might make it very difficult for them to abstain from war. If the world, and especially Europe, were to be divided into two hostile camps the smaller States wished to avoid participation on either side. Fearful that the status quo Powers would employ the machinery of the League to involve them against the non-Member Powers, they demanded a tacit or avowed recognition that they were not bound by the coercive obligations of Article 16. They could no longer depend upon the League system for protection; so they wished to avoid the reprisals from powerful and hostile non-Members which participation in that system might imply.

The European "Small Neutrals"

On July 1, 1936, a joint declaration was signed by the Foreign Ministers of seven of the smaller European States--Denmark, Finland, the Netherlands, Norway, Spain, Sweden, and Switzerland. This declaration stated that the Foreign Ministers had exchanged views "on the effects of current events on the organisation and working of the League of Nations" and that they were in agreement on certain points.¹

This declaration did not repudiate the League nor state an intention of withdrawing from it, but raised a question as to the force of its obligations, particularly for the seven countries, under the existing circumstances. To quote,

The aggravation of the international situation and the cases of resort to force that have occurred during the last few

¹For the text of the declaration see League of Nations, Official Journal, Special Supplement No. 154, 1936, p. 19.

years, in violation of the Covenant of the League, have given rise in our countries to some doubt whether the conditions in which they undertook the obligations contained in the Covenant still exist to any satisfactory extent.

The Foreign Ministers did not think that certain parts of the Covenant, especially Article 8, should remain a dead letter while other articles were enforced. They favored the success of the experiment represented by the establishment of the League, but thought that it was necessary to consider whether the Covenant could be amended, or its application modified, so as to increase the security of States. That their Governments would have reservations as to the application of sanctions was indicated by the statement of the seven Foreign Ministers that ". . . we would place it on record that, so long as the Covenant as a whole is applied only incompletely and inconsistently, we are obliged to bear that fact in mind in connection with the application of Article 16."²

After a conference of their Ministers for Foreign Affairs on August 20, 1936, the Governments of Denmark, Finland, Norway, and Sweden presented to the Secretary General statements elucidating the position reflected in the Declaration of Seven.³

On January 31, 1938, the delegate of Sweden stated, before the Special Committee Set Up to Study the Application of the Principles of the Covenant,⁴ that

in practice, the League no longer possesses the characteristics of a coercive League corresponding to the provisions of Article 16 of the Covenant. By the force of events, without any amendment of the Covenant, a practice has become established whereby Members of the League do not consider themselves bound to take coercive action against an aggressor State.

In further explaining the official position of the Swedish Government, the delegate said, "What is important is that it [the Swedish attitude] should be recognised as a loyal and legitimate interpretation of the fact that changed conditions have made it impossible for the League at the present time to act in conformity with the letter of the provisions of the Covenant."⁶

²Ibid.

³Ibid., pp. 15-19, 20-23.

⁴See infra, p. 117.

⁵League of Nations, Official Journal, Special Supplement No. 180, 1938, pp. 9-10.

⁶Ibid., p. 10.

M. Uden, the Swedish delegate, continued with the explanation that this was not to imply that the idea of collective security was being abandoned for the future, or that the League should renounce the possibility of effectively intervening in a conflict through spontaneous collaboration by its Members. Rather, he argued that a frank recognition of weakness was better than maintaining "the fiction of a system of automatic and obligatory sanctions."⁷

The course of Switzerland took the form of an attempt to obtain a renewed recognition of its "unique" position. The Swiss Government, after joining in the Declaration of July 1, stated in a letter of September 4, 1936, to the Secretary General that

if, notwithstanding the criticisms it incurs, Article 16 should be retained substantially in its present form, or if the risks it involves should be made still greater, Switzerland would be obliged to call attention once again to her peculiar position, which the Council of the League, in the Declaration of London of February 13th, 1920, described as unique. The Federal Council must in any case point out once more that Switzerland cannot be held to sanctions which, in their nature and through their effects, would seriously endanger her neutrality. That perpetual neutrality is established by age-old tradition, and all Europe joined in recognising its unquestionable advantages over a hundred years ago.⁸

This position was reiterated in a statement before the Special Committee of the League on January 31, 1938.⁹ The Swiss representative referred, at that time, to "a League from which two great neighbouring Powers have withdrawn and from which, moreover, two other great Powers in more distant parts of the world are absent. In our eyes," he continued, "these facts are decisive. They deprive differential neutrality of its political and psychological basis. They make the application of Article 16 by Switzerland impossible."¹⁰

The claim of Switzerland to a special position was recognized by the Council of the League on May 14, 1938. The Council, by a resolution of this date,

takes note that Switzerland, invoking her perpetual neutrality, has expressed the intention not to participate any longer in any manner in the putting into operation of the provisions of the Covenant relating to sanctions and declares that she will not be invited to do so;

⁷ Ibid.

⁸ Ibid., No. 154, 1936, p. 29. See supra, pp. 14, 42.

⁹ Ibid., No. 180, 1938, pp. 10-13. ¹⁰ Ibid., p. 11.

And places on record that the Swiss Government declares its determination to maintain unaltered in all other respects her position as a Member of the League, and to continue to give the facilities which have been accorded to the League for the free exercise by its institutions of their activities in Swiss territory.¹¹

The events of 1935-36 also resulted in a modification of the international status of Belgium. King Leopold, in an address to his Cabinet on October 14, 1936, said, "The reoccupation of the Rhine by breaking the Locarno agreements both in the letter and in the spirit has placed us almost in the same international position as we were in before the War."¹²

Any policy of alliance with a single country would weaken Belgium's position abroad and cause divisions at home. A mere defensive alliance would not be sufficient, since aid could not arrive in time to bear the brunt of an attack. "That is why," King Leopold continued, "we must follow a policy exclusively and entirely Belgian. This policy should aim resolutely at placing us outside any dispute of our neighbors. It responds to our national ideal."

It was subsequently explained that this speech, which was devoted primarily to a justification for Belgian rearmament, did not mean that Belgium wished to renounce the League of Nations and revert to the pre-War status of neutrality. What Belgium wanted was to be free from obligations to render military assistance to another State, and secondly, to make an independent examination of any new agreement for a Western Pact to replace the Locarno Treaties. After a period of negotiations, there was signed on April 24, 1937 a joint Anglo-French declaration which released Belgium from her obligations under the Locarno Treaties and the Four-Power Agreement of March 19, 1936. France and Great Britain reaffirmed their own obligations under the Locarno agreements and renewed their pledges of assistance to Belgium in the event of attack, while the latter undertook to defend her frontier against aggression and gave assurances of loyalty to the Covenant of the League.

¹¹League of Nations, Official Journal, May-June, 1938, pp. 368-75.

¹²For the documents relative to the new policy of Belgium see Stephen Heald (ed.), Documents on International Affairs, 1936 (London: Humphrey Milford, 1937), pp. 220-51.

The Netherlands Government, also, joined the movement toward "de facto revision" of the Covenant. M. Rutgers stated before the Special Committee on January 31, 1938 that

the Netherlands Government has never desired, and does not now desire, a return to the old system of general neutrality when a war breaks out. It still supports the system of collective neutrality. But this does not prevent it from looking the facts in the face. The obligation to apply sanctions . . . no longer can be considered . . . as in force. For the moment, there remains the faculty of applying sanctions . . .
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The Special Committee of the League

The League of Nations was not slow to take cognizance of the necessity for considering the problems raised by the failure of sanctions. By a resolution of July 4, 1936 the Assembly recommended that the Council invite the members of the League to make proposals for the improvement of the application of the principles of the Covenant, and that the Secretary-General be instructed to make a classification of the proposals and report to the next meeting of the Assembly. The problem, as conceived by the Assembly, was expressed in the preamble of the resolution of July 4, 1936, as follows:

(3) Noting that various circumstances have prevented the full application of the Covenant of the League of Nations;

(4) Remaining firmly attached to the principles of the Covenant

(5) Being desirous of strengthening the authority of the League of Nations by adapting the application of these principles to the lessons of experience;

(6) Being convinced that it is necessary to strengthen the real effectiveness of the guarantees of security which the League affords to its Members.¹⁴

By November 20, 1936 communications had been received from twenty-five Governments, and seventeen others had made statements in the Assembly. The declarations of these forty-two Governments were duly classified and analyzed by the Secretary-General, in accordance with the Assembly resolution of July 4.¹⁵

¹³League of Nations, Official Journal, Special Supplement No. 180, 1938, p. 14.

¹⁴For the text of the Assembly resolutions see ibid., No. 154, 1936, p. 6.

¹⁵For this classification and analysis see ibid., pp. 44-97. The communications received are reproduced in the same document (pp. 6-40). The Ecuadorean communication, which was received after Special Supplement No. 154 had gone to press, is summarized (p. 97). For an analysis of the statements see Georg Schwartz-

Some Governments were doubtful as to the expediency of considering the application of the principles of the Covenant at the time. Poland, for example, thought that the study was premature and that the discussion should take place "in a political atmosphere which had been cleared of the heavy anxieties of the present moment."¹⁶

The U. S. S. R., on the contrary, expressed the view that "it is the very presence of these anxieties which constitutes the most powerful argument in favour of an early consideration of this question."¹⁷

The Governments stated, in general, that they appreciated the value of the League and desired its maintenance and prosperity, but there was disagreement as to functions, obligations, and methods. Different Governments tended to emphasize collective security, prevention of war, or disarmament, while others stressed the necessity of effective application of the Covenant as a whole. A substantial number of Governments favored the maintenance or strengthening of the Covenant. Other Governments, however, advocated a restriction of obligations under the Covenant, on the ground that formal obligations should more nearly correspond with what could actually be undertaken. Several Governments stressed the importance of a genuine intention to apply the Covenant. Most Governments were opposed, or at least not very favorable, to the idea of amending the Covenant. Accessory agreements and interpretations by Assembly resolutions were suggested as methods of revision, while Colombia proposed that doubts as to the interpretation of the Covenant be settled by the Permanent Court of International Justice and the New Zealand Government proposed that all members of the League hold a national plebiscite on the application of Article 16.

Twenty-two Governments referred to the League's lack of universality as an obstacle or expressed the desire that it should be made universal. The Peruvian Government wished to make the conditions of admission and withdrawal more strict. The majority of Governments desiring the universality of the League declared

berger, "The States Members of the League and the Reform of the Covenant," New Commonwealth Quarterly, II (December, 1936), 351-59.

¹⁶ League of Nations, Official Journal, Special Supplement No. 154, 1936, p. 47.

¹⁷ Ibid.

in favor of regular co-operation with non-Members. Colombia, Panama, and Uruguay put forth proposals for regional or continental unions to be substituted, to a greater or lesser extent, for the League of Nations, while the French Government stated that "it would be a serious mistake to compromise this principle of universality."¹⁸

Certain Governments proposed to change the composition of the Council by abolishing the permanent seats, causing Members of the Council to be elected on a regional basis, or substituting a system of rotation for election or combining the two. Argentina and Panama desired an examination of the respective jurisdictions of the Council and Assembly, and Peru advocated proportional representation of continental groups in the organization of the Secretariat.

The general unanimity rule (Article 5) gave rise to little comment, although it was proposed that in some cases the rule should be interpreted in a particular way; for example, that the votes of the parties to a dispute should not be counted.

With reference to the reduction and limitation of armaments (Article 8), several Governments expressed the opinion that new discussions should be undertaken. More specific proposals included the publicity of budgetary expenditures for armaments, supervision of the manufacture of and trade in arms, establishment of a permanent disarmament commission, and creation of an international force. There was also a proposal to retain only the first paragraph of Article 8.

In connection with Article 11, attention was called to the necessity of preventive action and of League intervention at an early stage. M. Litvinoff expressed the opinion that Article 11 cannot "avert a breach of the peace which arises from calculated aggressiveness and the pursuit of conquest, for which disputes are deliberately engineered."¹⁹

Some Governments suggested that, in procedure under Article 11, the votes of the parties concerned should not be counted or that the rule of unanimity should be abolished. The Bulgarian Government proposed that Article 11 be supplemented by bilateral conventions, and several other Governments thought that the Convention of September 26, 1931 to Improve the Means of Pre-

¹⁸Ibid., p. 61.

¹⁹Ibid., p. 68.

venting War should be the complement of Article 11.

There were several proposals, especially from the Argentine Government, that the Covenant of the League be co-ordinated with the Pact of Paris and the Argentine Anti-War Pact.

Several Governments made references to an improvement in the methods for pacific settlement of disputes; for example, the development of procedure under Article 13 and the recommendation that decisions to ask the Permanent Court of International Justice for an advisory opinion be taken by a majority vote.

Some general observations on the subject of Article 10 were made, and its relations to Articles 16 and 19, respectively, were pointed out.

Since the failure of action under Article 16 to halt aggression was largely responsible for the discussion of revision of the Covenant, it is interesting to note the statements of Governments with respect to that Article. The declarations and proposals of several Governments indicated that they regarded collective security as one of the most important elements in the Covenant. The view that application of Article 16 should be contingent on certain conditions was expressed by several Governments. Peru called attention to the disproportion, from the point of view of degree of civilization, often existing between two parties to a dispute--specifically the Italo-Ethiopian conflict. Hungary wanted "the repressive clauses of the Covenant" brought into equilibrium with Articles 11, 13, and 19; New Zealand stressed the importance of a definite method of rectifying international grievances; Denmark, Finland, Norway, Sweden, and Canada referred to the close connection between Articles 8 and 16.

Some Governments were doubtful as to the practical value of the principle of collective security under the existing circumstances. The Argentine Government stated that those provisions of the Covenant no longer in harmony with the realities of international life should be given an optional character. The delegate of Canada said that his Government had made no absolute commitments either for or against participation in war or other forms of force, and that any decision with regard to such participation would be taken in the light of all existing circumstances. Ecuador referred to a "right of abstention," while Panama and Peru pointed out the difficulty of requiring participation in collective action from States with relatively remote interests in the

conflict giving rise to such action. The Swiss Government declared that the sanctions system creates inequalities, since sanctions cannot be applied in all cases, and the risks involved are much greater for some States than for others. Therefore, "Switzerland cannot be held to sanctions which, in their nature and through their effects, would seriously endanger her neutrality."²⁰

With reference to economic and financial sanctions, the Swedish Government made the general observation that their application depends on general political factors, rather than on the adoption of modified texts. Four Governments referred to the necessity for making some sort of advance preparations for the application of such measures. The question of economic and financial sanctions raises the problem of whether they should be automatic. The Chinese Government declared that measures under Article 16, paragraph 1, should be automatic, immediate, and all-inclusive; Colombia proposed that they come into force automatically as soon as the competent organs of the League had determined the aggressor; the Estonian Government thought sanctions should be automatic so far as possible; and New Zealand expressed the view that sanctions would be ineffective unless they were immediate and automatic, and took the form of a complete boycott. On the other hand, several Governments declared against automatic sanctions.

Two Governments, Peru and the U. S. S. R., suggested that there should be some differentiation among States as to their obligations to apply sanctions.

The Lithuanian Government expressed the opinion that sanctions should not be restricted to negative action, but that direct non-military assistance should be given to the victim of aggression. Several other Governments referred to the Convention of October 2, 1930 for Financial Assistance. The delegation of Panama proposed "diplomatic and moral" sanctions and compensation for damage caused by aggression.

The question of military sanctions also evoked a diversity of views. The Chinese and Portuguese Governments emphasized the utility of this type of action. Most of the Governments which expressed an opinion believed that military sanctions should not be universally obligatory. The Argentine Government presented a typical view in stating that military measures should not "be bind-

²⁰Ibid., p. 77.

ing on Members not implicated in the dispute, or only having an indirect interest therein."²¹

The New Zealand Government, however, indicated its willingness to join in the collective application of force against any future aggressor, and Colombia stated that military sanctions should be obligatory only for States situated in the same continent as the aggressor.

A number of Governments were in favor of regional pacts of mutual assistance as a device for supplementing the guarantees of the Covenant. There was usually a stipulation that these pacts should satisfy certain conditions; for example, that they should be open to the accession of other States, concluded in conformity with League principles and supervised by the League, and that they should be designed to supplement without weakening the Covenant. Most of the proposals for the application of Article 16 and regional pacts of mutual assistance would increase the functions of organs of the League in determining the aggressor and applying sanctions.

In addition to the foregoing declarations and proposals, there was a variety of comments on other aspects of the Covenant. The Bulgarian Government considered it important to coordinate Articles 18 and 20 by refusing registration to treaties incompatible with the Covenant. A number of Governments declared themselves in varying degrees in favor of the principle of Article 19. Four of the Latin American Governments commented on Article 21. Haiti and Iraq wished some sort of reexamination of the mandates system.

There was a substantial number of references to the desirability of certain forms of international co-operation--economic and financial, and co-operation "in bringing about a closer understanding between peoples." Several Governments wished to separate the Covenant from the Peace Treaties. Finally, Colombia proposed that the Permanent Court of International Justice settle doubts as to the interpretation of the Covenant.

The foregoing summary of the comments of forty-two Governments on the problems of revising the Covenant points to two conclusions: (a) a wide variety of questions with respect to nearly every part of the Covenant was raised; and (b) the focal

²¹Ibid., p. 81.

point of the comments and proposals was obviously Article 16.

By a resolution of October 10, 1936, the Assembly set up a Special Committee of twenty-eight Member States to study the proposals which had been made and to prepare a report.²² This Committee held its first session December 14 to 17, 1936, to determine its method of work. M. Bourqiuin, of Belgium, was elected chairman, a list of the principal questions raised in the Government communications and declarations was drawn up, and a number of rapporteurs were instructed to make an analysis of the problems to be examined. On May 31, 1937 the rapporteurs held an unofficial exchange of views. A meeting of the Committee, on September 30, 1937, resulted in the framing by a Committee of Jurists of proposals with regard to the separation of the Covenant from the Peace Treaties; approval of a draft resolution declaring that the League should take steps to coordinate its action with States non-Members of the League, but bound by the Pact of Paris and the Argentine Anti-War Pact; and approval of a proposal to request suggestions from non-Member States.²³

The third session of the Special Committee, held January 31 to February 2, 1938, was devoted to an examination and discussion of a report by Lord Cranborne on the participation of all States in the League of Nations.²⁴ One aspect of this question relates to the rules and procedure for the admission of non-Member States to the League, and a memorandum dealing with this subject was prepared by the Secretariat. The entire report of Viscount Cranborne was devoted to the central problem of the universality of the League.²⁵

The Cranborne report was a succinct and forceful analysis of the situation, summarizing all points of view, rather than an argument for any one position. Universal membership in the League, this report stated, might mean the inclusion of all politically organized territory, all States to which membership is open under Article 1 of the Covenant, all States whose participation is essential to any genuine scheme of international co-operation, or, more immediately, it might mean the extension of League membership to those States which are at present non-Members and whose co-operation is particularly essential.

²²Ibid., pp. 41-43.

²³Ibid., No. 180, 1938, p. 5.

²⁴Ibid., pp. 5-60.

²⁵Ibid., pp. 41 ff.

The grounds for the desirability of universal membership in the League are (a) that the conceptions on which the League is based imply universality as an ideal; (b) that the Covenant was framed on the assumption that the League would be universal, and cannot function effectively otherwise; and (c) that lack of universality engenders the danger of a system of alliances and division into rival armed camps.²⁶

In answer to the question, Why is League membership not universal now? three classes of non-Members were identified. First, some States are opposed to the idea of general international co-operation as such and wish to maintain their international contacts on an ad hoc basis. Second, some States are not opposed to the general idea of international co-operation, but hesitate to assume definite commitments. Third, there are other States which fall in neither of the two other classes but which disapprove of certain features of the League as constituted at present.

Considerations of the importance and feasibility of obtaining universal membership led to a discussion of the three possible types of organization for the League, with the implications of each type. First, a League of Nations might provide for the actual enforcement of peace by the imposition of sanctions in some form. This, stated the Cranborne Report, might be called a "coercive" League. As an alternative, there might be a League involving no obligation whatever to impose sanctions. Machinery for the pacific settlement of international disputes would be provided, but failure to use it or abide by its decisions would involve no commitments on the part of third Members to use force to deter a delinquent State. This type of League would be "non-coercive." A third type would be an "intermediate" League, which would avoid obligations for a definite and predetermined course in the event of aggression. As each threatening situation arose, the Members would meet and consult. Decisions would be on an ad hoc basis, and the possibility of coercive action would not be excluded. Third Members of such a League would have a right,²⁷ but not a duty, to impose sanctions, although there might be some

²⁶ In a summary of opinions with respect to functioning of the League if membership were universal, it was pointed out that universality would not guarantee effectiveness.

²⁷ The report uses the word "faculty."

regulation of the use of coercion. In the words of the report, "One of the legal effects of giving such a faculty would be that no member which had violated the Covenant could, as a matter of juridical right, complain of the use of force against it by other members, or require of these the observance of the rules of neutrality in the dispute involved."²⁸

If the device of an "intermediate" League were adopted and sanctions were made "facultative" instead of obligatory, and this would seem to be a temptingly plausible compromise, the modification of Article 16 would go beyond the previously prevailing interpretation. Formerly, the application of sanctions was incumbent upon Members of the League in case of a "resort to war" within the meaning of Article 16; only the existence of such a situation was open to the decision of the Members. In an "intermediate" League, the obligation itself would be replaced by a permissive grant. The "shall" of Article 16 would be changed to "may." If the accepted interpretation of Article 16²⁹ permitted the introduction and increasing dominance of considerations of Machtpolitik little needs to be said of the ominous possibilities of "facultative" sanctions.

The discussion of the Cranborne Report by the Special Committee reflected the fundamental dilemma involved in its terms of reference. The League of Nations must be "universal" to function effectively, but present conditions suggest that it could be made universal, if at all, only by eliminating from the Covenant all obligations which give it practical meaning. One might say, paradoxically, that collective security under the Covenant depends upon destroying the requisites of its maintenance--or, in other words, that so far as the restraint of aggression is concerned the League can be effective by satisfying two mutually exclusive conditions. And this would be merely to say that the League, in the present state of the world, cannot be depended upon to control international violence. In the words of the Cranborne Report,

those whose ideal is a more or less coercive League, and who want universal membership in order to make such a League effective, are confronted with the possibility that the principal condition on which alone this ideal can be realised can per-

²⁸League of Nations, Official Journal, Special Supplement No. 180, 1938, p. 42.

²⁹See supra, chap. 1.

haps only be achieved by sacrificing a large part of the ideal itself. Those, on the other hand, whose ideal is a non-coercive League, for the reason, amongst others, that universal membership would thereby be facilitated, must not overlook the possibility that the achievement of it in these conditions might add little to the world which it would not have possessed without a League at all.³⁰

What seems to have been the prevailing attitude of the members of the Special Committee is reflected in the statement of the delegate of Sweden that "changed conditions have made it impossible for the League at the present time to act in conformity with the letter of the provisions of the Covenant. . . . [this] remark . . . does not imply the abandonment of the idea of collective security for the future."³¹

The Special Committee came to no decision as to a proposed course of action, and restricted itself to transmitting to the Assembly a brief report of progress, with the minutes of its meeting and the reports submitted by its rapporteurs.³² The Committee had an unenviable task. Difficulties arising from a denial of the basic postulates of collective security cannot be overcome by devising a slightly different form of collective security. Little can be expected from an attempt to remedy an indisposition to apply the Covenant by tinkering with its machinery. Particular defects of the Covenant are irrelevant to the larger question. No effort to eliminate those defects should be spared, but the fundamental problem is the non-use, not the imperfection, of the instrument. A sufficient juridical and organizational basis of collective security already exists. The difficulty lies in the political, social, economic, and ideological spheres. It is no denial

³⁰League of Nations, Official Journal, Special Supplement No. 180, 1938, p. 43.

³¹Ibid., p. 10.

³²In addition to the Cranborne Report, these included discussions of the coordination of peace instruments, regional or continental organization of the League, methods of revision, and Articles 10, 11, and 16. See ibid., pp. 76 ff. In September 1938 the Assembly adopted a resolution to refer a Report of the Sixth Committee, relating to Article 16, to the Members of the League; a resolution endorsing co-operation between the League and non-Member States; and a resolution recommending the separation of the Covenant from the Peace Treaties. A resolution providing that recommendations might be made under Article 11, paragraph 1, without the consent of the parties to a dispute was defeated, with Hungary and Poland voting in the negative, and eleven States abstaining (ibid., No. 183, 1938, pp. 97-100, 142-52). See also No. 189, 1938.

of the essential superiority of international solidarity over Machtpolitik to recognize that at the present time collective security is very deep in the valley of the shadow.

Résumé of Unofficial Opinion

An analysis of the trend toward "de facto revision" of the Covenant was undertaken by the New Commonwealth Institute. The first report, analyzing the statements of Governments on the subject of revision of the Covenant, was issued in December, 1936.³³ The second report (December, 1937) was concerned with an analysis of the work of the League's Special Committee and concluded:

To recapitulate--the first part of our survey has shown how under the unanimity rule of the Covenant, the League machinery for the repression of aggression can be reduced to a mere theoretical existence and how as a result, a de facto revision of the League, transforming it into a non-coercive League, has in fact taken place.

In the Reform Committee the struggle still continues between those forces which want to see a legal seal on this de facto situation and those which wish to leave the door open for a return to the full application of the Covenant.³⁴

In order to obtain the opinions of qualified students of this question, it was decided to send a questionnaire to a number of specially chosen collaborators all over the world, excepting Germany, Italy, and Japan. Replies were received from men in public life and authorities on international law and relations of fourteen different nationalities.³⁵ Unanimity was nearly reached on the proposition that there had been a "de facto revision" of the Covenant, and most collaborators denied that the attitude of League Members was consistent with their legal obligations. The majority felt that any alteration in the text of the Covenant would, under the circumstances, mean a retrogression rather than a reform.

There was substantial agreement that there is a connection between hostilities in different regions and that little faith could be placed in the device of localizing war. Authorities on

³³Schwartzzenberger, New Commonwealth Quarterly, II (December, 1936), 351-59.

³⁴Ibid., III (December, 1937), 271-72.

³⁵For an analysis of these replies see Schwartzzenberger, "An Analysis of the Replies to Our Questionnaire on the De Facto Revision of the Covenant," ibid., IV (June, 1938), 60-74.

international law were convinced that the collective method is better than "individual peace."

Many of the replies stressed the importance of conditions indispensable to a genuine system of international justice and security. A relatively high percentage favored a short-term solution similar to the ideas of Mr. Winston Churchill, according to which the peace system would be based on a defensive alliance between Great Britain, France, possibly the U. S. S. R., and any other League Members desiring to participate. This system, it was claimed, would have a great superiority of force, homogeneity of interest, and the benevolent neutrality of the United States. It would also provide a method for peaceful change between members, and would be open to adherence by other States.

Numerous replies pointed out that methods exist to prevent the outbreak of a major war, but that the question was one of whether Governments would avail themselves of these opportunities. The majority believed that security should come before redress of grievances and disarmament, but many emphasized the point that they must be dealt with simultaneously.

Summary

A consideration of "de facto revision" of the Covenant since the failure of sanctions in the Italo-Ethiopian conflict definitely indicates that the smaller States are abandoning the League system for whatever ad hoc security they can find elsewhere. It also seems obvious that failures of collective security are not matters of machinery and procedure, but arise from the existence of a fundamental situation in which no international machinery for the international control of international violence can be made effectively applicable.

CHAPTER VII

THE PRINCIPLE OF CONCERN

A consideration of international law and organization since the World War, as it relates to the problem of violence and third States, suggests, in the first place, that the function of the principle of differential treatment has been limited by interpretation, by non-acceptance in several important respects, and by certain positive survivals of the principle of traditional neutrality. In the second place, it may be suggested that the most important constructive trend in international law and organization since the World War has been the recognition that all States have not only a political, but also a juridical, interest in the methods by which international disputes are settled.

The Denial of International Solidarity

The importance of the matter of interpretation can hardly be overestimated, since formal undertakings acquire definite practical meaning only through a process of application and interpretation. Juridical norms and principles of social organization, like constitutional grants of power, are expressed in general terms, the particular construction of which must be left to the exigencies of historical development. Law is ostensibly a pattern to which activity must conform, but interpretative juridical concepts are used in such a way that law becomes the instrument of selected activities. In the distributive processes of any society, established legal norms tend to implement the claims of those who exercise control in that society. Generalities are always ambivalent and derive a precise meaning only from definition by constituted authority, which is at liberty in any given case to base the definition either upon the standard of "looking to the facts," or upon the postulate that to effectuate the purpose of any generality under consideration it must be assumed that "in judicial contemplation" the facts do not coincide with what common sense holds them to be. This device makes it possible to evolve the same general concept into antithetical results.

The applicability of any principle--say that of differential treatment against an aggressor--depends upon the existence of the state of facts to which that principle is designed to apply, and the answer to the question of whether such a state of facts actually exists at any given time and place is implicit in the controlling definition of the terms which describe the relevant situation. Decisions as to whether the occasion has arisen for the application of measures contingent upon the existence of a specified situation, such as "resort to war," will be based to a large extent upon judgments which involve an arational consensus; that is, an interpretative assumption derived from a multiplicity of interacting historical factors and in accordance with which all general obligations are given their practical construction.

For example, a constitutional grant of power--say to regulate interstate commerce--has no definite content in and of itself. It acquires functional meaning only when construed by its official interpreters (the Supreme Court). In turn, the particular meaning given to this grant of power depends upon all the factors which have influenced the existing political and social situation, and which have contributed to the molding of the justices' assumptions. An apt illustration in the field of international relations is the problem of defensive war. If it is accepted that all participation in hostilities except in necessary self-defense is to be penalized, the obligations resulting from an outbreak of hostilities depend upon the definition of "defense." Does it mean resisting an attack, or does it mean incapacitating a potential enemy? Only when this question is answered does the prohibition of non-defensive war acquire any practical meaning. Obviously, the definition of such an important word will depend more upon politics than upon etymology.

Another question is, who has the final authority to promulgate the definition? If the litigant can do this without restraint, the prohibition means exactly nothing. The devising of disinterested definitions is essential to a juridical system, but no matter how impartial and just the definitions they will have favorable and unfavorable implications as between opposing litigants in particular cases. Their impact will depend, in the last analysis, upon the assumptions according to which they are framed. So far as the functioning of the League system is concerned, a resort to war within the meaning of Article 16 is what the League

Members decide that it is. And they have bequeathed us some pointed examples of the flexibility of definitions.

The accepted interpretations of Article 16 of the Covenant¹ might operate either to expedite or to impede the purpose of the Covenant. Applying sanctions "gradually and partially" might be used either to insure flexibility of collective action and to avoid unnecessary shocks to the international economy, or to evade the obligations of Article 16. The same may be said of the principle of allowing for exceptional circumstances in which some States might be placed. And, when a State is allowed to interpret its own requirements of special treatment the term "peculiar position" is likely to become a euphemism for "special interests."

According to a resolution presented in connection with the Draft Treaty of Mutual Assistance in 1923 allowance was to be made for "exceptional situations brought to the notice of the Council and recognized by it as such."² This resolution contemplated a subordination of the special claims of Member States to the principle of international solidarity. The rejection of that alternative leaves no adequate guarantee against the denial of international solidarity and the assertion of nationalistic sovereignty by expanding the exemptions from collective obligations to the point where the rule is vitiated by the magnitude of the deviations from it. An essential requirement of a vital system for the restraint of violence is that it be made effectively applicable to the condition sought to be proscribed. A juridical system in which penalties for breach of obligations can be evaded by a circumlocution is likely to be characterized chiefly by the inapplicability of its own norms. Unfortunately, the international system is by no means free from this danger.

The inherent difficulty of evaluating the importance of the extent of non-acceptance of the principle of differential treatment is obvious. However, it is only necessary to point out that this principle has not been incorporated into international law and organization in such a way as to accomplish its avowed object of providing security against aggression. The failure to

¹See supra, chap. 1.

²League of Nations, Official Journal, Special Supplement No. 13, 1923, p. 154.

solve the post-War problem of disarmament on the basis of the principle of differential treatment was ipso facto an admission that, in the practice of States, mutual security could not yet be considered a dependable substitute for national armaments. Repudiation of the expectation of international violence did not reach the stage of dispensability of the weapons of international war.

The principle of differential treatment has been characterized by the fact that it was conceived in large part as a weapon of competing nationalisms, rather than as an instrument of international order and justice as such. The real post-War problem was that of incorporating victors and vanquished into one international system. Failure at this vital point would result in the rise of hostile alliances as soon as the defeated nations became strong enough to challenge the beneficiaries of the Peace Treaties. Collective security on the basis of differential treatment of aggressor States could be established only through an international system supported by the acquiescence of an international community. However, instead of a renunciation of militaristic nationalism and the acceptance of policies and conditions prerequisite to the establishment of a just and enduring peace there was a struggle of separate nationalisms for the aid and comfort of the new concepts. The attempt was made to obtain security against violence without giving up any advantages based upon the assumption of violence. Collective security tended to become another variant (with a potent ideology) of the system of Macht-politik which it ostensibly repudiated. Adolf Hitler could say with some justification that

where there should have been equality there was division into victors and vanquished. Instead of equal rights there was discrimination between those with rights and those without. Instead of general reconciliation there was punishment of the defeated. Instead of international disarmament there was disarmament of the vanquished alone. Instead of general security there was security only for the victors.³

In a system of Machtpolitik the assumption prevails that a gain for one State or group of States is pro tanto a loss for other

³In his speech of May 21, 1935 (F. J. Berber [ed.], Locarno: A Collection of Documents [London: Wm. Hodge & Co., 1936], p. 128). One would not expect Hitler to consider what would have been the case if the Central Powers had won the World War.

States. Given the existence of such an assumption, a general system of mutual security and co-operation is a priori impossible. This is not to say that particular reciprocal gains (for example, by trade treaties) cannot be accomplished, but that with regard to factors of power no State is willing to lose relatively to other States, but on the contrary demands to gain in order to be sure that it is not losing. States strive not so much for a balance as for a favorable preponderance of power. With respect to armaments each State seeks a national defensive power sufficient to give it a "margin of safety," or reasonable assurance of victory in any conflict in which it may become involved. Security is construed in terms of supremacy, and the security of one is the insecurity of others. In such a system particular arrangements for the maintenance of peace will collapse sooner or later, since they will be regarded as temporary expedients incidental to the contest for power. Collective security, however, must emphasize opposition to war as such rather than to what another State may gain by war, and devotion to peace as such rather than to what peace enables one's State to keep.

This does not imply that the renunciation of national self-interest is essential to a system for the control of international violence. In every society individuals and groups use the law for their own purposes. The essence of law is not altruism on the part of the component members of society. The argument that certain States seek to further their interests through a system of collective security is beside the point. Under any alternative system States would seek to further their own interests. The fact that law is used as an instrument of antagonistic interests and purposes by the members of a collectivity does not preclude its functioning as a system of orderly relationships from the viewpoint of the collectivity as a whole. It is only necessary that the collectivity regulate and control the function of law in serving the purposes of its members. However, the international situation is characterized by the fact that individual States control the instruments of power, and therefore regulation by the collectivity is not effective.

Any non-acceptance of the principle of differential treatment is equivalent to a continued dependence upon the principle of traditional neutrality, if one accepts the assumption that when changes are made in a system of law the preceding system continues

in force except to the extent that changes have been made explicitly or by necessary implication. Therefore, as far as the League of Nations was concerned the occurrence of a status of neutrality remained possible by reason of the "gaps" in the Covenant and the fact that the League system was not universally accepted. Also, it seems necessary to assume that neutrality would be a permissible status if hostilities should occur and no action were taken under the Covenant, the Pact of Paris, or some other anti-war instrument. Otherwise a "vacuum" in the law would exist.

In addition to these considerations, however, there were certain positive survivals of the principle of traditional neutrality. Switzerland's exceptional position in the League, the conclusion of a number of "neutrality treaties" by States some of which were Members of the League, the attempt by international conferences and unofficial groups to restate neutral rights and duties, and the position of the United States are some of the forms in which the system of neutrality has persisted.⁴ One of the significant aspects of the progressive abandonment of the collective system has been the reversion to a policy of neutrality on the part of the smaller nations which had always been ranked among the strongest advocates of collective security. Belgium, for example, now insists on a right to remain neutral in the event of war, adopting a policy aimed "solely . . . at placing us outside the quarrels of our neighbors and keeping war from our territory."⁵ Switzerland, although always claiming exemption from some of the burdens of League membership, now demands full exemption from all obligations of differential treatment. Everywhere the demonstrations of the incapacity of the League of Nations to guarantee the independence and territorial integrity of weak nations have produced an attempt of those nations to find security in a policy of neutrality or in the protection of some powerful ally.

The coexistence of the principles of differential treatment and neutrality gives rise to two problems; to wit, as to the status of the law of neutrality and as to the significance of survivals of traditional neutrality in a system based partially upon the principle of differential treatment.

If the adoption of a policy of neutrality is more than an act of desperation it must be based upon the assumption that

⁴See supra, chaps. III and V.

⁵Supra, p. 116.

neutrality is in fact a dependable principle of international law and organization. But a question may be raised as to whether traditional neutrality is a real alternative to collective security under the present circumstances, in that the particular relationships appropriate to it do not have the qualities of universality and dependability essential to the functional validity of any system of law. The events of the World War left the situation with respect to the traditional rules of neutral rights and duties in a chaotic condition, and since then no general agreement on the subject has been reached. There has been no proposal, codification, draft convention, or treaty which has obtained the adherence or support of any substantial number of States, and Great Britain and the United States have expressly reserved their juridical position.⁶ Of course a State might appeal to the nineteenth-century precedents, but the point here stressed is that there has been no general acquiescence in what the law of neutrality actually permits and requires.

The factor of industrial resources as a major strategic element in modern war and the attendant lack of a clear distinction between combatant and non-combatant forces; new weapons of warfare, such as the submarine, airplane, and radio; and the unwillingness of Governments to restrict their freedom of action in advance emphasize the apparently insuperable difficulties involved in any attempt to codify neutral rights and duties.⁷ At the same time, the rise of a new conception of the relations of third States to those engaged in hostilities has been accompanied by serious doubts as to the wisdom or practicality of authoritatively restating the law of neutrality. The net result is that so-called neutral rights have become neutral claims. A right under international law rests upon its recognition by third States and resultant enforceability through international procedures. International law, like municipal law, cannot be regarded as existing at all in any real sense unless there is an explicit or implicit general consensus as to the rights and duties of its subjects. The law of neutrality does not meet this requirement, however, since the

⁶See supra, chap. 111.

⁷The difficulties are obviously enhanced by the fact that the points as to which there is the most dispute are at the same time the hardest to settle and the most likely to involve a nation in trouble.

chaos of conflicting claims with respect to the question of neutral rights and duties extends much further than the penumbra of uncertainty which arises from the controversial points and borderline cases incidental to any living legal system.

Any dependence upon traditional neutrality also raises the problem of the relation of that principle to the development of a system based upon differential treatment. An interpretation of the implications of continued acceptance of the nineteenth century conception in any form must logically either construe the two alternatives as definitely exclusive of each other or posit the assumption that certain aspects of the earlier system will function as transitional elements in the establishment and integration of a system of collective security. The so-called "neutrality treaties" furnish an apt instance of this problem.⁸ There has been no occasion for a court of competent jurisdiction to pronounce upon the rights and duties flowing from these treaties, and therefore no authoritative opinion as to their juridical import is possible. One thing is clear; to wit, that to interpret the "neutrality treaties" as requiring impartiality leaves--so far as League Members are concerned--the possibility of conflict with the obligations of Article 16. However, a promise to remain neutral might be interpreted as superseded by the obligations of Article 16, provided a co-signatory were found to be a victim of aggression. According to such an interpretation the "neutrality treaties" would be supplementary to the peace system of the Covenant. On the other hand, the obligations of a "neutrality treaty," combined with the accepted interpretation that each State may decide as to its own participation in sanctions, obviously might operate to impede the functioning of a collective system.

The problem of interpreting the significance of the "neutrality treaties" is merely one instance of the confusion which exists with respect to international law and organization for the restraint of violence between States. The significance of the partial acceptance of differential treatment and the uncertain position of neutrality is the coexistence of two antithetical principles, neither of which is accorded the support requisite to its functioning as a dependable instrument for the control of

⁸See supra, pp. 43-47.

international violence. Neutrality, as well as collective security, contemplates the existence of an international system. The control or restriction of international violence absolutely requires the regularization of the relations of third States with States involved in hostilities. When two juridical systems compete with each other within the same area of social organization the result is likely to be their mutual destruction. This is true because the very existence of law is dependent upon the "security of expectation." When customary law is no longer observed and there is no law by agreement to take its place, there is no positive basis for that general acquiescence which is essential to law. The occurrence of unregulated violence, in the form of undeclared wars and coercive diplomacy, is a denial of the essential relevance of any international juridical system.

The Juridical Principle of Concern

International law and organization since the World War has been characterized, in the second place, by the growing recognition of the principle that any international violence is a concern of every nation. Article 11 of the Covenant brought into the orbit of the League every war or threat of war. The Pact of Paris provided a practically universal basis for reprisals against any State which might use war as an instrument of national policy. Pan-American international organization has recognized the common interest of the American republics in the preservation of peace among themselves. The United States, despite its neutrality policy, has shown evidence of concern in the methods by which international disputes are settled.⁹ On November 15, 1937 the Brussels Conference declared:

Against this [the Japanese position] the representatives of the states now met at Brussels consider this conflict of concern in fact to all countries party to the Nine Power Treaty of Washington of 1922 and to all countries party to the Pact of Paris of 1928, and of concern in fact to all countries members of the family of nations.¹⁰

⁹Supra, chap. v. President Roosevelt and Secretary Hull have on a number of occasions referred to the concern of the United States in any international violence. For typical statements see U.S. Department of State, Press Releases, No. 413 (August 28, 1937), p. 167; No. 417 (September 25, 1937), p. 250; No. 419 (October 9, 1937), pp. 277-78.

¹⁰Ibid., No. 425 (November 20, 1937), p. 381. The same position was taken in the declaration of November 24 (No. 426 [November 27, 1937], pp. 399-401).

The replacing of the obligations of legal impartiality by the authorization of differential treatment provides the juridical basis for that action for the maintenance of peace which may seem most appropriate in the circumstances. War in itself is no longer a "subject and source of rights," and it results in rights only as a consequence of the non-application of sanctions by third States. Therefore the objective of the movement against war should not be so much the elaboration of the machinery of peaceful settlement as a constructive use of such machinery as exists. The task of those who are interested in international order and peace is not, in the present stage of historical development, to impose a logically complete system but to expedite the working of the conditions under which international order would be a normal development. Legal norms must be appropriate to the conditions actually existing in the society which they are designed to regulate, and it is a mistake to attempt to enforce a system in a situation which is incompatible with its effective functioning. International brigandage may require international vigilantism.

The "principle of concern" can provide a basis of action with respect to any conflict. It involves a minimum departure from traditional concepts and yet is consistent with a maximum of international co-operation. It is an essential principle of international solidarity and it can also be asserted in a world of competing nationalisms, since any State may take the position that its interests are adversely affected by any disturbance of international peace. It is a concept, not of abolishing the old to establish the new, but of interpreting the old in the direction of the new. For these reasons, the "principle of concern" represents the line along which practical progress toward the control of international violence may most reasonably be expected. The compatibility of this principle with the trend toward "de facto revision" of the Covenant, involving "facultative" sanctions and ad hoc action for the maintenance of peace, is especially noteworthy at the present time.

Conclusion

It is the tragedy of "collective security" that formal progress in the control of international violence has been accompanied by a disintegration of the social and political bases of control. The juridical competence of third States to pass judgment

on the legitimacy of any State's participation in war, and to apply differential treatment on the basis of such judgment, has been established. Unfortunately, defiance and denial of effective implementation of this juridical competence have rendered the controls impotent and exposed the world to a resurgence of anarchic violence. A description of the situation suggests that the avoidance both of a fatalistic despair and of an elaboration of a sterile formalism depends upon constructive ad hoc action based upon the principle of concern.

